SUMMARY of COOPERATIVE CASES

FARMER COOPERATIVE SERVICE
U. S. DEPARTMENT OF AGRICULTURE
WASHINGTON, D. C.

SUMMARY NO. 59

MARCH 1954

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[Formerly prepared by Mr. Mischler for the Cooperative Research and Service Division of the Farm Credit Administration. This Division is now the Farmer Cooperative Service.]

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The comments on cases reviewed herein represent the personal opinion of the author and not necessarily the official views of the Department of Agriculture.

TAXABILITY OF AN EXEMPT ORGANIZATION AFTER EXEMPTION IS REVOKED

(Automobile Club of Michigan v. C.I.R., 20 T.C. No. 145)

New light is shed on the question as to what the tax liability might be of an exempt farmers' cooperative which finds its exemption revoked, by the decision of the Tax Court in Automobile Club of Michigan, Petitioner, v. Commissioner of Internal Revenue, Respondent, Docket No. 27988, 20 T.C. No. 145, issued September 23, 1953.

The petitioner was incorporated in Michigan as an auto club in 1916. In 1934, it inquired of respondent whether it was exempt. After considering the information which petitioner filed in compliance with the regulations, respondent by letter dated June 11, 1934, held that it was exempt under section 103 (9) of the Revenue Act of 1932. Petitioner was also told that under section 101 (9) of the Revenue Act of 1934 it would not be required to file returns so long as there was no change in its organization, its purposes or methods of doing business. In 1937, petitioner's status was reviewed, and its exemption under section 101 (9) of the Revenue Act of 1936 and freedom from filing returns were affirmed by letter dated July 5, 1938. On May 12, 1945, respondent wrote petitioner that the Bureau of Internal Revenue was reconsidering the exemption of automobile associations in the light of a recent opinion of its Chief Counsel, and asked for new information. This was supplied. On July 16, 1945, the Bureau wrote petitioner that it did not consider the petitioner exempt under 101 (9). The letter revoked the rulings of June 11, 1934, and July 5, 1938, and concluded as follows:

> "In view of all the facts and circumstances in your case it is held, with the approval of the Secretary of the Treasury, that you will not be required to file income tax returns for years beginning prior to January 1, 1943. You are, however, required to file returns for the year 1943 and subsequent years."

Petitioner, as required by section 54(f) of the Internal Revenue Code (added in 1943), had filed information return Form 990 for 1943 and 1944. It had filed no other form of return. However, upon the receipt of the July 16, 1945, letter it filed income and excess profit tax returns for the calendar years 1943 and 1944 under protest on the ground

that it was exempt from tax. These returns were filed on October 22, 1945. On August 25, 1948, petitioner and respondent entered into consents that the amount of taxes due for 1943 and 1944 could be assessed at any time before June 30, 1949. This date was later extended to June 30, 1950. On February 20, 1950, the Bureau issued a notice of deficiency, which formed the basis of the Tax Court action.

The principal issues were the correctness of the respondent's action "(1) in determining that for the years 1943 through 1947 the petitioner was not exempt from income and excess profits taxes, as a club organized and operated exclusively for pleasure, recreation and other non-profitable purposes, within the purview of section 101 (9) of the Internal Revenue Code, (2) in determining that the period of limitations for assessment of tax for 1943 and 1944 had not expired at the time of mailing of the deficiency notice, (3) in determining that the entire amount of membership dues received by petitioner during each of the years 1943 through 1947 is to be included in income for the year in which received, and (4) in determining the deductions allowable as depreciation or amortization for the years 1943 through 1947."

On the first point, the petitioner conceded in its brief that under certain cited court decisions it was not exempt from tax for taxable years ending after July 16, 1945, the date of the revocation letter. Also the petitioner did not contend that during 1943 and 1944 it was in fact and in law an organization of the class contemplated by section 101 (9). Petitioner contended, however, "that by having established its tax-exempt status in the manner provided by respondent's regulations, and there having been no change in its character, it is entitled under the law to retain its tax-exempt status for all taxable years ending before the year in which the respondent revoked his prior rulings as to its status." In brief, petitioner argued that respondent's rulings and regulations (on not having to file a return so long as status did not change) had the force and effect of law, and, therefore, his revocation could not be made retroactive.

In ruling against the petitioner on this point, the Tax Court said:

> "The petitioner's contentions present the question of whether the regulations relied on by petitioner were intended to have the meaning attributed to them by the petitioner. In Southern Maryland Agricultural Fair Association, 40 B.T.A. 549, we had occasion to consider the meaning and effect of such regulations. In that case the Commissioner issued a ruling in 1924 holding that the taxpayer was exempt from tax. Believing that the ruling relieved it from the duty of filing returns, the taxpayer

did not file any returns for the years 1923 through 1935. Early in 1937 the Commissioner reversed the ruling made in 1924 and held that the taxpayer was not and never had been exempt and notified the taxpayer accordingly. He also determined deficiencies against the petitioner for the years 1921 through 1935. There the applicable regulations as to corporations establishing exemption and the lack of necessity thereafter for filing returns were substantially the same as the regulations involved here. Two questions were presented, namely, whether the 1924 ruling and the applicable regulations excused the taxpayer from filing returns for the years 1923 through 1935 and whether the Commissioner had authority to reverse the 1924 ruling. In deciding both questions adversely to the taxpayer, we stated that although the Commissioner could not change the law by regulations, he could make reasonable regulations to assist him in administering the act and deciding whether a particular corporation was or was not exempt by statute. We concluded that was what he had done by the regulations there involved and held that such regulations were intended to be and were administrative, not legislative. Further, we stated that the inference should not be drawn from the regulations that the respondent thereby intended to write into the limitation provisions of the revenue acts words which would provide a different period of limitations from that provided in the revenue acts for the benefit of those corporations which he might erroneously conclude were exempt. We held that the Commissioner could not thus change the law if he so desired.

"Considering the petitioner's contentions here in the light of what was said in the Southern Maryland Agricultural Fair Association case, we must conclude that the regulations here relied on were not intended to, and did not, in any way modify or change the provisions of the revenue acts and the Code relating to exempt organizations. Organizations that were actually exempt were made so by the provisions of the revenue acts and the Code. They were not required to file any returns and the Commissioner could not change their status by regulations. Organizations not coming within the provisions of the revenue acts and the Code relating to exempt organizations were not exempt and the regulations in question neither purported to, nor could, make them exempt.

"In the Reynolds Tobacco Co. case, the question for decision was whether gain accruing to a corporation from the purchase

and resale of its own shares constituted gross income within the meaning of section 22(a) of the Revenue Act of 1928. Under the Revenue Act of 1928, the Commissioner issued a regulation to the effect that a corporation realized no gain or loss from the purchase or sale of its own stock. At least from 1920 such administrative construction was uniform with respect to each of the revenue acts from that of 1913 through 1932. In May 1934 the regulation was amended to provide that where a corporation deals in its own shares as it might in the shares of another corporation, the resulting gain or loss was to be computed in the same manner as though the corporation were dealing in the shares of another. In 1929 the taxpayer sold certain of its shares acquired in that and prior years for a sum which exceeded cost. The Court concluded that since successive revenue acts had reenacted without alteration the definition of gross income as it stood in the acts of 1913, 1916 and 1918, Congress must be taken to have approved the administrative construction represented by the earlier regulation and thereby to have given it the force of law. Accordingly, the Court held that the amended regulation was not to be applied retroactively and that the taxpayer's tax liability for 1929 was to be determined under the regulation in force in 1929.

"Clearly the situation here is different from that presented in the Reynolds Tobacco Co. case. The regulations involved there were legislative in nature in that they purported to determine what did or did not constitute gain or loss. The regulations here involved were administrative in character and in nowise purported to determine whether any organization was or was not exempt. Accordingly, the holding in the Reynolds Tobacco Co. case does not have here the effect contended for by petitioner."

On the second point, the Court also held against petitioner, and ruled that the deficiency notice had been filed in proper time. The opinion on this point reads as follows:

"The petitioner contends that even if it be determined that the respondent had authority to determine deficiencies against it for 1943 and 1944, we must conclude that the notice of deficiency was not sent within the applicable periods of limitations and that assessments of the deficiencies for those years are barred because

the periods of limitations began to run prior to the filing of the income and excess profits tax returns on October 22, 1945. The petitioner concedes that under section 275(a) of the Code the period of limitations begins to run from the filing of the return. However, it contends that where a taxpayer is not under a duty to file a return for a given year, the period of limitations for such year begins to run from the date the return should have been filed if there had been a duty to file it. In support of its position the petitioner relies on Balkan Nat. Ins. Co. v. Commissioner, 101 F. 2d 75, and Stockstrom v. Commissioner, 190 F. 2d 283.

"In the Balkan Nat. Ins. Co. case, the Alien Property Custodian seized all of the records of a foreign corporation prior to the time the return for 1918 was due and the records were never returned to the corporation. The corporation never filed any return. It was held that the statute had run in 1934 against assessment of a deficiency for 1918 since the Government had made it impossible for the corporation to file any return for 1918. Obviously the present case is not like that case nor is it as strong factually for the taxpayer. The petitioner at all times was in possession of its records. In the Stockstrom case, the donor of gifts to trusts filed a gift tax return for 1936 and paid the tax thereon computed in accordance with the Commissioner's then outstanding ruling as to exclusions for gifts to trusts. Thereafter in 1937, and on the basis of certain court decisions, the Commissioner reversed his ruling as to exclusions for gifts to trusts. On the basis of the new ruling the respondent refunded the donor's gift tax paid for 1936 and approved the exclusions taken, on the basis of the new ruling, in the donor's 1937 gift tax return. On the basis of the new ruling, the donor was not liable for gift tax for 1938 and filed no return for that year. In 1941 a revenue agent obtained the facts and figures as to gifts made to trusts in 1938. He and another employee of the Bureau considered the liability of the donor for gift tax for 1938 and the donor was informed that there was no liability. In 1948, and on the basis of a Supreme Court decision rendered in March 1941, the respondent reversed his 1937 ruling and determined a deficiency in gift tax for 1938. The Court concluded that when the facts and figures as to the donor's gifts in 1938 were obtained in 1941, it was the collector's duty promptly to file a return for the donor for 1938, that such duty should not have been postponed for years

in order to prevent the statute of limitations from running and held that assessment of the deficiency was barred. Clearly the instant case is distinguishable on its facts from the Stockstrom case.

"Here, the respondent on July 16, 1945, and in the same notice in which he determined that the petitioner was not exempt from tax and in which he revoked his prior rulings, requested the petitioner to file income tax returns for 1943 and 1944. So far as shown no revenue agent or other employee of the Bureau theretofore had made an investigation of the petitioner's affairs and obtained from petitioner data upon which to compute its income tax liability for those years.

"Because of factual differences we are unable to find that the decisions in the Balkan Nat. Ins. Co. and Stockstrom cases are applicable here.

"In Southern Maryland Agricultural Fair Association, supra, we considered the question of whether an erroneous ruling by respondent (subsequently revoked) that a corporation was exempt from tax was effectual, with respect to taxable years prior to that of revocation, for starting the running of the statutory period of limitations and held that it was not. We think our holding there is applicable here.

"The petitioner further urges that the periods of limitations began to run for 1943 and 1944 when it filed Forms 990 for the respective years. It contends that such forms contained sufficient data from which its income and excess profits tax liability for such years could be computed and assessed and that, consequently, such forms are to be considered as the returns contemplated by section 275(a) of the Code. From a comparison of Forms 990 filed by the petitioner for 1943 and 1944 with the income and excess profits tax returns filed for those years, we have found that the Forms 990 do not contain sufficient data from which the petitioner's income and excess profits taxes for those years could be computed and assessed. In a similar situation in John Danz, 18 T.C. 454 (on appeal, C.A. 9), we held that the Forms 990 were not sufficient to start the running of the period fixed by section 275(a) of the Code for assessment and collection of the tax due. On authority of our holding there, the contention of the petitioner is denied."

The Court also held against the petitioner on points (3) and (4) quoted above. On point (3), it held that the respondent was correct in treating all membership dues received by petitioner during a taxable year as income for that year, even though they were in part received before they were earned and some portion of them might have to be refunded in the future. Petitioner kept its books and filed its returns on the accrual basis and received the membership dues, although paid in advance, without restriction as to their use and disposition. On point (4), the Court held that depreciation or amortization on properties acquired prior to March 1, 1943, and used by petitioner in its business after that date, was to be computed on the same basis as if petitioner had always been held to be a corporation subject to tax. The Court reasoned that, since there was no showing that at any time during its existence prior to March 1, 1943, was the petitioner an organization exempt by law, it could not claim that it should not have been following the provisions of the Code as respects depreciation during the entire period the property was held.

It is considered to be the law that a farmers' cooperative having a letter of exemption under section 101 (12) (A) can lose that exemption automatically whenever the exemption terms are not complied with--whether or not the Commissioner has knowledge of the facts constituting the violation. The Commissioner, of course, can also specifically revoke the letter of exemption. From that point on, the association is a taxable entity, assuming that the facts support the loss of exemption.

Unless the association, although "exempt," had nevertheless filed a tax return each year, apparently the rule is as expressed in the above case--i.e., the statute of limitations will offer no protection. This case also makes it clear that the filing of Form 990 will not start the running of the statute, because it is not a tax return and does not supply sufficient information from which the amount of tax due, if any, can be determined. It is believed that Form 990-C, which "exempt" farmers' cooperatives must now file, is an adequate tax return and, therefore, the courts would probably hold that the filing of Form 990-C would start the statute.

Also, unless such an association during the time it qualified for exemption conducted its legal and operating procedures in such a manner as constantly to qualify for the maximum exclusions from

gross income available to a taxable cooperative, it might find itself taxable on its entire net operating proceeds for one or more years. A taxable cooperative is permitted to exclude patronage refunds from its gross income only if such refunds are made pursuant to a mandatory obligation existing prior to the accrual of the margins and then only if such refunds are paid or established as definite liabilities within the fiscal year. Hence, even though the association were operating under a mandatory obligation to pay patronage refunds and on an accrual basis, it presumably would not have the leeway (permitted to exempt cooperatives) to include as patronage refunds in a particular fiscal year those allocated within 8-1/2 months after the close of the fiscal year. It is generally considered that refunds authorized by the board of directors within a fiscal year but not actually paid in cash or noncash form to patrons within 2-1/2 months after the close of the fiscal year (the due date of the return) could only be claimed as an exclusion in the succeeding fiscal year.

It is clear, of course, that such an association also would not be privileged to take the special deductions available to exempt cooperatives for any of the taxable years occurring after loss of exemption. Moreover, it would be subject to such civil penalties as would apply generally to taxes not paid when due.

In the foregoing discussion, it has been assumed that the alleged noncompliance has been in respect to a requirement on which there might be room for a difference of opinion, so that the association may not be aware of its noncompliance or at least may have considered that it was complying. If the case involves a deliberate or intentional noncompliance, the association also may be subject to the criminal penalties imposed by section 145(a) of the Internal Revenue Code.

The consequences outlined above which can result from a loss of exemption could be quite serious in some cases. Accordingly, it seems highly advisable that management, or their advisers, should not take chances but should refer doubtful operations to the Internal Revenue Service for a ruling, before embarking upon them.

POOLING OF BUYING POWER NO VIOLATION OF FTC ACT

(In Re Associated Greeting Card Distributors of America, Docket 5983, 2/16/54)

A recent decision of the Federal Trade Commission in Associated Greeting Card Distributors of America, Docket 5983, February 16, 1954, should be of interest to purchasing cooperatives. In this case, the Commission holds that an organization of distributors formed for the sole purpose of combining their purchasing power and thus obtaining favorable prices was not illegal per se and was not in violation of Section 5 of the Federal Trade Commission Act. The Commission also held that evidence that discounts secured through the joint buying efforts were not justified by savings in cost was not relevant in this proceeding; it would be pertinent only if a violation of Section 2(f) of the Clayton Act were charged.

Excerpts from the text follow:

> "We may assume that collusive activity by buyers to coerce a seller or sellers, through boycott, threat of boycott, intimidation, or like means, is unreasonable and therefore unlawful. . . .
>
> "The record in this case, however, contains none of these elements of illegality. There is no evidence, moreover, showing injury to competing wholesalers or to the manufacturing segment. Likewise, there is no evidence that retailers have been adversely affected.
>
> "The facts indicate nothing more than a relatively simple practice of joint purchasing by small business wholesalers in an industry marked by the predominant use of other distribution methods. These small concerns have purchased . . . greeting cards and accessories as a result of open bargaining, and such purchases have been made from numerous manufacturers. Furthermore, individual association members have continued to buy from the regular stock of manufacturers . . . .
>
> "In brief, this appears to be an instance in which a few small concerns have joined together as buyers in a non-collusive effort to wage competition, not to restrict it.

"Quite unlike the present case was United States v. New York Great A. & P. Tea Co., 173 F. 2d 79 (C.A. 7, 1949), (affirming 67 F. Supp. 626), in which it was the use of monopoly power to obtain preferences in price and other terms that brought the grocery chain's buying practices within the purview of the Sherman Act. See also United States v. Crescent Amusement Company et al., 323 U.S. 173 (1944); Schine Chain Theatres, Inc., et al. v. United States, 334 U.S. 110 (1948); United States v. Griffith, 334 U.S. 100 (1948); United States v. Paramount Pictures, Inc., 334 U.S. 131 (1948), which involved the use of mass buying power to obtain first runs and other preferences in the motion picture industry.

"At the hearing, evidence was adduced in an attempt to show that certain of the discounts and allowances received by [distributors] were justified by savings in cost. However, the hearing examiner found that these discounts and allowances were not justified by savings in view of the fact that, while they were based upon the total purchases of all members of the association, there was no single billing or delivery point. Assuming these facts as found by the examiner to be correct, we are unable to agree that it follows that Section 5 of the Federal Trade Commission Act has been violated. This is not a case brought under Section 2(f) of the Clayton Act. If there is reason on believe that [distributors] have knowingly induced or received the granting of a discriminatory price in violation of the Clayton Act, then such a violation should be pleaded and proved. Suffice it to say that the evidence does not persuade us that Section 5 of the Federal Trade Commission Act has been violated."

IRS RULING ON TAX TREATMENT BY PATRONS OF PATRONAGE REFUNDS

A ruling of the Internal Revenue Service (Rev. Bul. 54-10, issued January 11, 1954) sets forth the policy of the Service with respect to the tax treatment by patrons of patronage dividends and other amounts allocated in document (noncash) form by cooperative associations. This bulletin reemphasizes the requirements of section 39.22(a) - 23(b)(1) of Regulations 118 dealing with the taxability of amounts allocated to a patron on a patronage basis. These regulations provide that if the allocation is made in noncash form the amounts allocated shall be included in the computation of gross income of the patron to the extent of the face amount of such documents provided the allocation is made in fulfillment and satisfaction of a valid obligation of such association to the patron, which obligation was in existence prior to the receipt by the cooperative association of the amount allocated.

As the ruling emphasizes, this is merely a reaffirmation of a policy of the Service "which has been long established." Since the 1951 Act made no change as regards the taxability of patrons, that Act could hardly be said to justify any new tax treatment of patrons. The ruling also points out that this treatment is consistent "with the theory under which patronage dividends are treated by cooperative associations"; namely, ". . . that the patron by express contract or by doing business with the cooperative agrees to allow the association to retain funds to which the patron is entitled. . . . It is considered that the patron has in effect received in money the face amount of the document and has either reinvested such amount in the capital of the association or allowed the association the use of the money. . . ."

Finally, the bulletin recognizes the problem presented by the fact that some patrons have failed to report the entire face amount, even though the regulations require such action. It sets forth the following rules to be used "in determining the extent to which amounts allocated in document form by a cooperative association should be included in the computation of the patron's gross income":

"1. Where an allocation was made pursuant to a pre-existing agreement:

"a. If the period of limitationshas not expired for the patron's taxable year in which the allocation was made, the

amount of the allocation should be included in the patron's gross income to the extent of the face amount of the documents.

"b. If the period of limitations has expired for the patron's taxable year in which the allocation was made, the difference, if any, between the amount reported in the year of allocation and the amount received upon redemption, sale or other disposition of the documents should be included in the patron's income for the taxable year in which the redemption, sale or other disposition took place.

"2. Where an allocation was made which was not in pursuance to a pre-existing agreement and the document issued was not a negotiable instrument the amount received upon redemption, sale or other disposition of the document should be included in gross income for the patron's taxable year in which received.

"3. Where an allocation was made which was not in pursuance to a pre-existing agreement and the document issued was a negotiable instrument:

"a. If the period of limitations has not expired for the taxable year of the patron in which the allocation was made, the fair market value of the instrument should be included in the patron's gross income.

"b. If the period of limitations has expired the difference between the amount reported in the year of allocation and the amount received upon surrender, sale or other disposition of the instrument should be included in the patron's gross income.

". . . An exception to the rule stated in 1.b. above will be recognized in any case in which the Internal Revenue Service had knowledge, prior to the expiration of the period of limitations, of the fact that the patron has included in his income in the year of allocation an amount less than the face amount of his certificate or other evidence of allocation. However, in any such case the Internal Revenue Service will be charged only with knowledge of the facts reflected in the taxpayer's return or discovered upon an investigation thereof."

TIME EXTENDED FOR FILING FORM 990-C

The Internal Revenue Service by Rev. Rul. 54-81 (originally issued as IR-Mimeograph No. 54-19, dated February 5, 1954) has extended the time for filing Form 990-C and the time for paying the income tax due by farmers' cooperative marketing and purchasing associations exempt under section 101 (12) of the Internal Revenue Code. This extension is applicable to "a taxable year beginning in 1953" and the time is extended "to and including the fifteenth day of the ninth month following the close of such taxable year."

However, unless advance payments are made on the tax interest will accrue at 6 percent per annum from the original due date until the tax is paid. On this point, the ruling reads as follows:

> "Sec. 5. Accumulation of Interest.
>
> "Interest at the rate of 6 percent per annum will be assessed and collected on the amount determined as the tax from the original due date for payment of the tax, the 15th day of the third month following the close of the taxable year, until it is paid. However, the payment of the tax, or any installment thereof, made in advance of the filing of the return will stay the accumulation of interest on the amount of such payment from the time it is paid. Accordingly, any association desiring to minimize the accumulation of such interest may make such advance payments in full or on the installment basis as provided in section 56 of the Internal Revenue Code to the district director of internal revenue with whom such return will be filed, clearly indentifying such payments in order to aid the district director in the proper application of such payments and in computing interest on deferred payments."

It is understood that the House Ways and Means Committee has voted tentatively to extend the filing date for Form 990-C permanently to eight and one-half months following the close of the tax year. This provision, if included in the proposed Revenue Act of 1954, will, of course, not become final unless and until it is enacted as a part of that Act.

INTERPRETATION OF AGRICULTURAL EXEMPTION--FLS ACT

(Stephens v. Cotton Producers Ass'n, 117 F. Supp. 517)

The Federal District Court held, in Stephens, et al., v. Cotton Producers Ass'n, et al., 117 F. Supp. 517, that Congress intended the exemption from the Fair Labor Standards Act for those employed in agriculture to apply not only where the farmer employed his own laborers to do work but also to cases where he utilized an association to do the work.

This was an action to recover unpaid minimum wages and overtime payment pursuant to the Fair Labor Standards Act. Although the Cotton Producers Association was joined as party defendant, the court decided at the conclusion of the testimony that only the Farmers Mutual Exchange of Calhoun, Inc., was involved and Cotton Producers Association was stricken.

Plaintiff was an employee of Farmers Mutual engaged in catching chickens on the farms of growers, loading them on defendant's trucks and trucking them to local processing plants at Holly Springs, Canton, and Lawrenceville. The court held, first, that the services of the plaintiff in connection with the catching of chickens, putting them in coops, and loading them upon the trucks of the defendant on the farms of the growers did not bring such employees under the Fair Labor Standards Act. Excerpts from the court's opinion on this point follow:

> "The Act provides in part that its provisions shall not apply 'with respect to * * * any employee employed in agriculture', 29 United States Code Annotated, § 213(a) (6). It also provides that the term 'agriculture' includes farming in all its branches and among other things, includes the raising of poultry 'and any practices performed by a farmer or on a farm as an incident to * * * such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market.' See 29 United States Code Annotated, § 203 (f). By the wording of the statute itself it is not required that certain activities to be agricultural must be performed by a farmer, but it is only necessary that the acts in question be 'performed * * * on a farm as an incident to * * * such farming operations'. It seems clear that when a farmer has raised chickens and wishes to market them, catching of the chickens, putting them in coops and loading them on a truck for transportation to market, is an incident to such farming operations. Although the above exemption is contained in a remedial

statute and should be construed strictly, it should nevertheless be given due effect if Congress so intended. Compare Damutz v. Wm. Pinchbeck, Inc., 2 Cir., 158 F. 2d 882(3), 170 A.L.R. 1246. The mere fact that the farmer, instead of employing his own help to catch and load chickens, procured Farmers Mutual through its employees to do the same, should not defeat the exemption.

* * * * * *

". . . . This ruling is in accord with interpretations placed upon the Act by the Administrator in his release No. M-13 on March 28, 1947, which states in part: 'The handling and cooping of live poultry for market are also within the scope of this exemption.' Bearing in mind the consistent and historic policy of Congress to assist the farmers, I cannot conclude that Congress intended to give the farmer this exemption only if he employed his own laborers to catch his chickens, and to deprive him of his exemption merely because he employed an association, such as Farmers Mutual Exchange, to do so. There is no such limitation in the statute."

The court then ruled that one of the plaintiffs, Johnston, was engaged in the production of goods for commerce while driving the truck. The court said that, although under some circumstances Johnston might be said to be "engaged in commerce," it was not necessary to decide whether he was engaged in interstate commerce, because:

"This Court is ruling that the employee of a retail feed store having an agreement with a farmer to haul the farmer's chickens from the farm to a processing plant to which the farmer has sold the chickens, there to be cleaned, dressed and shipped in commerce is, while engaged in driving such truck, engaged in the production of goods for Commerce."

The court also held that plaintiff Johnston, in transporting the chickens from the farms to the processing plants, was an "individual employed within the area of production," and was so engaged in trips to Holly Springs, but not so engaged in two trips to Canton and on one trip to Lawrenceville. An excerpt from the opinion on this issue follows:

"Was plaintiff Johnston, in transporting the chickens from the farms to the processing plants 'any individual employed within the area of production'? Pursuant to this statute, the Administrator by regulation defined 'area of production'. In Part 536

of his Rules and Regulations and in Section 536.2 (see 29 U.S.C.A. App.) the Administrator provided that 'an individual shall be regarded as employed in the "area of production" * * * in handling, packing, storing * * * in their raw or natural state * * * agricultural or horticultural commodities for market * * * if the establishment where he is employed is located in the open country or in a rural community', and 95% of the commodities on which such operations are performed by the establishment come from normal rural sources of supply located not more than fifty airline miles (in case of poultry processing plants) from the establishment. The terms 'open country' or 'rural community', it was stated, shall not include any city, town, or urban place of 2500 or greater population. It further provided that the commodity should be considered to come from normal rural sources of supply within specified distances above if they were received from farms within such specified distances.

"Under the evidence here, the processing plant at Holly Springs, Georgia, qualifies as one of the exempted establishments under the above regulations, and to that plant Johnston made a number of trips. He also made two trips to a processing plant at Canton, Georgia, and one trip to a processing plant at Lawrenceville, Georgia, neither of these plants qualifying as exempt under the regulation.

"The Administrator also issued interpretive bulletin No. 14 explaining the terms 'handling of agricultural commodities for market,' Section 26 of this bulletin reading as follows:

"'26. The operations included in this term appear to be those physical operations customarily performed in obtaining agricultural or horticultural commodities from producers' farms, transporting them to and receiving them at the establishment, weighing them or otherwise determining on what basis the producer is to be paid, placing them in the establishment where further operations are to be performed, and delivering the commodities to warehouses. Specifically, these operations include loading the commodities on trucks, wagons, etc., in producers' fields or at concentration points, transporting them to the establishment, receiving and unloading them at the establishment, counting or weighing the commodities,

> assembling, binning, piling, or stacking them in the establishment, moving them from one place to another in the establishment, moving the bags, boxes, cases, barrels, bales, coops, and other loaded containers to wagons, trucks, railroad cars or other conveyances, and transporting the commodities away from the establishment. Since it makes no difference that the employer does not own the goods being handled, the employees of brokers or commission houses who physically handle the goods may be within the exemption.'

"On March 28, 1947 the Administrator by release No. M-13, provided in effect that the type of exemption under Section 13(a) (10) was concerned with operations on agricultural or horticultural commodities, these being defined as such commodities as they normally come from the farm and before their natural state has been changed. It also stated 'the handling of, cooping of, live poultry for market are also within the scope of this exemption.' It stated that 'operations are considered performed for market if the employer intends to dispose of his commodities in the form in which the particular operations leave them.' It stated that 'handling' includes those physical operations customarily performed in obtaining poultry or eggs, transporting them to and receiving them at the establishment, weighing them, placing them in the establishment, and delivering them to warehouse or to transportation facilities.

"It would seem to follow therefore, that defendant's employee Johnston, in transporting chickens from the farms to the processing plants (said plants being the market as far as the farmer was concerned) was, under the above statute, regulations and interpretations of the Administrator, 'an individual employed within the area of production' (that is to say, within the fifty mile area of the processing plants) and that he was engaged in handling (for this term includes transportation) in their raw or natural state, of agricultural commodities (chickens) for market.

"A casual reading of the above regulations adopted by the Administrator may create the impression that the phrase 'where employed' means that the person working at the processing plant must be employed by the processing plant in order to be exempt. Slight reflection, however, will dispel such an inference. The word 'employed' frequently refers to a person whose services are

utilized in furtherance of the business of another, notwithstanding the absence of a technical employer-employee relationship. 14 Words & Phrases, Employed, p. 500, et seq. Where the Administrator used the words 'where employed' he evidently meant 'where engaged'. As stated by Judge Borah in Tobin v. Girard Properties, Inc., 5 Cir., 206 F. 2d 524, 527. 'It is not important whether the employer * * * is engaged in interstate commerce. It is the work of the employee which is decisive.'

"It is not necessary to decide whether a different construction of the regulations might render them repugnant to the Act which, in Section 13(a) (10) provides exemption to any individual employed within the area of production engaged in handling agricultural commodities for market.

"If, therefore, Johnston's activities while employed in transporting these chickens to the processing plants, will bring him within the Act, so will his employment working at the processing plants, within the area of production, bring him within the exemption."